

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1083

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PJS

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

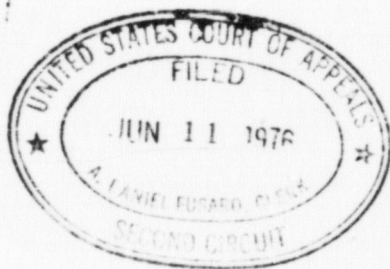
JAMES M. HENDRIX,

Defendant-Appellant.

Docket No. 76-1083

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JAMES M. HENDRIX
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

TITLE OF CASE

ATTORNEYS

For U. S.: DAWSON

U.S.

JAMES M. HENDRIX

For Defendant:

Murder within Maritime Jurisdiction

DATE	PROCEEDINGS
1/21/75	Before DOOLING, J.- Indictment filed
1-28-75	Before COSTANTINO J - case called - deft & atty Simon Chrein of Legal Aid present - deft arraigned and enters a plea of not guilty - case adjd to 3-14-75 - for all purposes. Motion for psychiatric examination - motion granted-submit Order.
1-29-75	By COSTANTINO J - Order filed that the deft be committed to Medical Center for Federal Prisoners, Springfield, Mo. to be examined as to his mental condition for a period not to exceed 60 days and that a report be rendered to the Hon. Judge Mark Costantino and copies of said report be sent to attys as indicated in order and U.S. Attorneys office and after examination has been completed, the deft., if sane, shall be returned to the custody of the U.S. Marshal.

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
1-30-75	Govts Notice of Readiness for Trial filed		
1/31/75	Certified copy of order of 1/29/75 retd and filed- copies mailed to Federal Detention Headquarters		
2-21-75	Order filed -retd executed-deft delivered to Medical Center for Federal Prisoners, Springfield, Mo.		
3/14/75	Before COSTANTINO, J.- Case called- Deft not present- case adjd to 4/14/75 at 10:00 A.M. for all purposes		
4-4-75	see entry on docket page D for correct information		
4-7-75	By COSTANTINO J - Order filed that Dr. Irwin Perr be admitted to Federal Detention Headquarters, 427 West St., NYC. for the purpose of interviewing the defendant. Copy to Mr. Chrein of Legal Aid.		
4-14-75	Before COSTANTINO J - case called - deft & atty S. Chrein of Legal Aid present - case adjd to May 16, 1975 for all purposes - motion for reduction of bail - bail reduced to \$200,000.00		
5-2-75	Before COSTANTINO J - case called - deft & atty S. Chrein present - Case set down for trial on June 16, 1975		
5-5-75	By COSTANTINO J - Order filed that a psychiatrist hereinafter designated by the Govt be permitted to examine the deft at Federal Det. Headquarters and further ORDERED that such psychiatrist designated by the Govt shall be permitted to employ such tests and examinations as are necessary, etc. Copied to Marshal.		
5-16-75	Before COSTANTINO J - case called & adjd to June 16, 1975 for trial		
6/12/75	Stenographers Transcript dated 5/2/75 filed		
6/12/75	Before COSTANTINO, J.- Case called- Case adjd to 6/30/75 at 10:00 AM. for trial		
6/30/75	Before COSTANTINO, J.- Case called- Deft and counsel present- Trial ordered and begun- jurors selected and sworn- Trial contd to 7/1/75 at 10:30 A.M.		
7/2/75	Before COSTANTINO, J.- Case called- Deft and counsel present- Trial resumed contd to 7/3/75		
7-1-75	Before COSTANTINO J - case called - deft & counsel present - trial resumed - trial contd to 7-2-75.		
7-2-75	Before COSTANTINO J - case called - deft & counsel present - trial resumed - Trial contd to 7-3-75.		
7/3/75	Before COSTANTINO, J.- Case called- Deft and counsel present- Trial resumed Trial contd to 7/10/75 at 10:00 A.M.		
7/7/75	Before COSTANTINO, J.- Case called- Deft and counsel present- Trial resumed Trial contd to 7/8/75 at 10:30 A.M.		
7/8/75	Before COSTANTINO, J.- Case called- Deft and counsel present- Trial resumed Motion to dismiss and judgment of acquittal denied-trial contd to 7/9/75		

CRIMINAL DOCKET

DATE	PROCEEDINGS
7/9/75	Before COSTANTINO, J. Case called- Deft and counsel present-Trial Both sides rest-court charges jury-jury retires to deliberate-trial to 7/10/75
7/9/75	By COSTANTINO, J.- Orders of sustenance and transportation transportation lodging filed(4)
7/10/75	Before COSTANTINO, J.- Case called- Deft and counsel present-Trial resumed-jury deliberations contd-Trial contd to 7/11/75
7/10/75	By COSTANTINO, J.- Orders of sustenance, lodging, and transportation
7/11/75	Before COSTANTINO, J.- Case called- Deft and counsel present-Trial resumed- Jury continues deliberations-Court withdraws juror No. 1 and declares a mistrial- Adj to 7/31/75 at 10:00 A.M. for status report-b.
7/14/75	By COSTANTINO, J.- Orders of sustenance filed(3)
7/14/75	Stenographers Transcripts dated 6/30/75, 7/1/75, 7/2/75, 7/3/75, 7/8/75, 7/9/75, 7/10/75 and 7/11/75 filed
7/15/75	By MISHLER CH. J.- Order filed that Augustus F. Kinzel be permitted visit and interview the defendant at his place of incarceration
7-17-75	Voucher for compensation for Expert Services filed. (HENDRIX)
7-24-75	By COSTANTINO J - Order filed that the U.S. Marshal is directed pay to Kenneth J. Gould the sum of \$15.34 to reimburse him for out of pocket expenses (a receipt for which is attached) for the jury in United States v. Hendrix.
7-31-75	Before COSTANTINO J - case called - deft Hendrix & counsel Simon Chrein of Legal Aid present - adjd to 9-16-75 for trial.
9-17-75	Before COSTANTINO J - case called - deft Hendrix & counsel Simon Chrein of Legal Aid present - Trial ordered and BEGUN- Jurors selected and sworn - trial contd to 9-18-75.
9/18/75	Before COSTANTINO, J.- Case called- Deft and counsel present-Trial Trial contd to 9/19/75 at 11:30 A.M.
9-19-75	Before COSTANTINO J - case called - deft & atty present - trial resumed - trial contd to 9-22-75 at 11:00 am.
9/23/75	Before COSTANTINO, J.- Case called- Deft and counsel present-Trial resumed-Govt rests-deft's motion to dismiss and for judgment of acquittal denied- trial contd to 9/24/75 at 10:00 A.M.
9-24-75	Before COSTANTINO J - case called - deft & atty present - trial resumed - trial contd to 9-25-75 at 9:30 am.
9-25-75	Before COSTANTINO J - case called - deft & atty present - trial resumed - Trial contd to 9-23-75

DATE	PROCEEDINGS
9-25-75	Before COSTANTINO J - case called - deft & atty present - trial resumed - trial contd to 9-26-75 at 9:30 am.
9-26-75	Before COSTANTINO J - case called - deft & atty present - trial resumed - Trial contd to 9-29-75.
9/29/75	Before COSTANTINO, J.- Case called- Deft and counsel present- Trial resumed jury retires to deliberate-jury returns and renders a verdict of guilty jury polled- and discharged- motion to set aside verdict denied- deft sentenced for study and report pursuant to T-18, U.S.C. Sec. 4208(a)(2)
9/29/75	By COSTANTINO, J.- Order of sustenance filed
9/29/75	Judgment and Commitment filed- certified copies to Marshal
9/29/75	Stenographers Transcript dated September 16,17,18,19,22,23,24,25,26 filed
10-1-75	Stenographers transcript filed dated 9-29-75.
10-2-75	Certified copy of Judgment & Commitment ret'd and filed - copies delivered to MCC, NY
4-4-75	By COSTANTINO J - Order filed that the deft be committed to Kings County Hospital, Brooklyn, N.Y. to be examined as to his mental condition etc. and that when such examination shall have been completed the deft shall be returned to the custody of the U.S. Marshal. (file number) (copies to Marshal) this entry inadvertently numbered/incorrectly by the U.S. Attorneys office
10-20-75	Voucher for Expert Services filed
12/29/75	Letter from deft dated 12/12/75 filed
12/31/75	By COSTANTINO, J.- Memorandum and Order filed in regard to request by deft for certain documents
2-20-76	Before COSTANTINO J - case called - deft & counsel S.Chrein present. Deft sentenced to imprisonment for 9 years. , and is to receive treatment for his mental condition during his incarceration. Notice of Appeal to be filed in forma pauperis by the Clerk.
2-20-76	Judgment & Commitment filed - certified copies to Marshal.
2-20-76	Notice of Appeal filed (no fee)
2-20-76	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.
2/25/76	Certified copy of Judgment and Commitment ret'd and filed- deft delivered to MCC
3/8/76	Copy of Order received from court of appeals that record be filed on or before 3/24/76
3-12-75	Notice of motion filed pursuant to Rule 35 for reduction of sentence etc
3/16/76	By COSTANTINO, J.-Memorandum and Order filed denying above motion

RJD:SHD:da
F.#751028

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA

- against -

JAMES M. HENDRIX,

Defendant.
----- X

75CR 54
INDICTMENT

Cr. No. _____
(T. 18, U.S.C. §§1111,
7 and **FILED**
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

★ JAN 21 1975 ★

THE GRAND JURY CHARGES:

TIME A.M.
P.M.

1. On or about the 30th day of December 1974, on board the S. S. Eagle Voyager, a vessel belonging in whole to the Sea Transport Corporation, a corporation created by and under the laws of the State of Delaware, while the said vessel was within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, that is, on board the S. S. Eagle Voyager while docked at the Port of Odessa, Union of Soviet Socialist Republics, the defendant JAMES M. HENDRIX, with malice aforethought and by means of manual strangulation did murder Robert E. Kiedinger. (Title 18, United States Code, Section 1111).

2. The Eastern District of New York is the federal judicial district into which the defendant JAMES M. HENDRIX was first brought following commission of the aforesaid offense. (Title 18, United States Code, Sections 7 and 3238).

A TRUE BILL

W. A. D. Anderson
FOREMAN.

B

12 THE COURT: Mr. Foreman, ladies and gentlemen
13 of the jury:

14 We now come to the final stage of the proceed-
15 ings. The Court will now charge you on the law to
16 be applied to the facts in the case.

17 As you may recall, I initially gave you a
18 pre-charge as to the manner in which the case would
19 be presented to you. I told you that most of the
20 evidence in the case would come in the form of the
21 testimony of witnesses, and that you were to pay
22 special attention to the manner in which the
23 witnesses testified.

24 I believe I also instructed you that you would
25 be the judges of the facts in the case, that being

Charge of the Court

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2 your sole province; and that your recollection of the
3 facts after having heard all of the evidence in the
4 case -- the testimony of witnesses and the documentary
5 proof -- was to control the determination of the
6 issues.

7 Likewise at that time I told you that I would
8 be the judge of the law. This has not changed at
9 this stage of the proceedings. I will not review
10 the facts in this case for you because I am certain
11 that with summations by the attorneys there is no
12 need for the Court to review the facts. In any event,
13 if you find that there is some fact in the case that
14 you may have forgotten or don't recollect, or you
15 can't agree with each other in your deliberations,
16 you can have it read back from the record, and that
17 will, I am sure, refresh your memory.

18 In any event, I am the judge of the law. You
19 must accept what I say to be the law in this case.

20 Now the attorneys have been permitted by the
21 Court and by the rules to make opening statements
22 and summations to you. Under no circumstances are
23 the statements they have made by way of opening or
24 by way of summation to be taken as evidence.
25 However the Court and the law does permit you to take

Charge of the Court

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2 the arguments that they have proffered before you and
3 weigh those arguments. And if you agree with what
4 they have said on either side of the case you may use
5 those arguments in your deliberations and in
6 discussing the case with each other, and try to
7 convince one another as to what the final determina-
8 tion shall be with reference to the deliberations at
9 hand.

10 If you feel that the arguments are not
11 commensurate with the testimony and the proof in the
12 case, you may disregard them. The arguments are not
13 evidence. You need not weigh them. However, there
14 are times when the arguments of the attorneys will
15 give you an insight as to something you may have
16 missed, and you may discuss that portion of it if
17 you so desire.

18 Now, of course, I also said to you that
19 during the trial, the Court will be the judge of the
20 law. Likewise, as to motions which at times we had
21 at a side bar, as you may recall. That was not for
22 the purpose of keeping any of the proof from you,
23 but were matters of law that were discussed between
24 the attorneys and the Court itself and should not
25 have come before you.

Charge of the Court

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2 In any event, if you feel that you have
3 discovered by some stretch of your imagination what
4 this Court thinks as to either some of the testimony
5 or the case itself, you should remove that from your
6 mind because I tell you here and now I have come to
7 no conclusion in this case nor have I indicated to
8 you in any way whatsoever what my feeling is with
9 reference to the facts in the case of with reference
10 to the guilt or innocence of the defendant. That is
11 your province and your job. You should not try to
12 weigh what you believe the Court's impression may be.

13 You must understand that the lawyers who
14 appear before you are advocates. They are advocating
15 the best case they can for the parties they represent
16 and they have a right to exercise as much forceful-
17 ness as they desire in their questioning or other-
18 wise in presenting their case. I say this because
19 this is within the framework of the ordinary trial.

20 You have been chosen and sworn as jurors in
21 this case to try the issues of fact presented by the
22 allegations of the indictment and the denial made by
23 the "Not-Guilty" plea of the accused. You are to
24 perform this duty without bias or prejudice as to
25 any party. The law does not permit jurors to be

1 Charge of the Court

2 governed by sympathy, prejudice or bias. Both the
3 accused and the public expect that you will carefully
4 and impartially consider all the evidence in the case,
5 follow the law as stated by the Court and reach a
6 just verdict, regardless of the consequences.

7 During my pre-charge I told you among other
8 things that the questions asked by the attorneys are
9 never to be considered as evidence even though the
10 question may contain a statement of evidence. You
11 are reminded that only the answer to the question is
12 evidence, if, of course, the question was answered.

13 Of course you know by this time that this
14 case has come before you by way of an indictment
15 presented by a Grand Jury sitting in this Eastern
16 District. That indictment charges the defendant with
17 the court I shall now read to you: Remember, the
18 indictment is merely an accusation, merely a piece
19 of paper. It is not evidence and is not proof of
20 anything.

21 The indictment reads:

22 "On or about the 30th day of December, 1974,
23 on board the S.S. EAGLE VOYAGER, a vessel belonging
24 in whole to the Sea Transport Corporation, a
25 corporation created by and under the laws of the

Charge of the Court

State of Delaware, while the said vessel was within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, that is, on board the S.S. EAGLE VOYAGER while docked at the Port of Odessa, Union of Soviet Socialist Republics, the defendant, James M. Hendrix, with malice aforethought and by means of manual strangulation did murder Robert E. Kiedinger." Title 18, United States Code, Section 1111.

"The Eastern District of New York is the Federal judicial district into which the defendant James M. Hendrix was first brought following commission of the aforesaid offense." Title 18, United States Code, Sections 7 and 3238.

18 United States Code, Section 1111 states in pertinent part as follows:

Murder in the second degree is the unlawful killing of a human being with malice aforethought.

Two essential elements are required to be proved in order to establish the offense of second degree murder charged in the indictment:

First: The act of killing a human being unlawfully;

Second: Doing such act with malice

Charge of the Court

aforethought.

The burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

"Unlawfully" means contrary to law. So, to do an act unlawfully means to do willfully something which is contrary to law.

An act is done willfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

Malice aforethought is a state of mind showing a heart regardless of the life and safety of another.

Malice aforethought may also be defined as the condition of mind which prompts a person to do willfully, that is, on purpose, without adequate provocation, justification, or excuse, a wrongful act whose foreseeable consequence is death or serious bodily injury. Malice aforethought does not necessarily imply any ill will, spite or hatred towards the individual killed. In determining whether a wrongful act is done with malice aforethought, you

Charge of the Court

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2 may infer that a person ordinarily intends the
3 natural and probable consequences of acts knowingly
4 done. In determining whether the defendant acted with
5 malice aforethought, however, you should consider all
6 facts and circumstances preceding, surrounding and
7 following the killing; as shown by the evidence in
8 this case, which tend to shed light upon the condition
9 of mind and heart of the killer before and at the time
10 of the deed.

11 Stated differently, malice aforethought means
12 an intent at the time of the killing, willfully to
13 take the life of a human being or an intent to act in
14 callous and wanton disregard of the consequences to
15 human life.

16 The defendant in this case asserts the
17 defense of insanity.

18 You are not to consider this defense unless you
19 have first found that the Government has proved beyond
20 a reasonable doubt each essential element of the
21 offense. One of these elements is the requirement of
22 malice aforethought, on which you have already been
23 instructed. In determining whether that requirement
24 has been proved beyond a reasonable doubt, you may
25 consider the testimony as to the defendant's abnormal

Charge of the Court

mental condition.

If you find that the Government has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense, you must find the defendant not guilty.

If, however, you find that the Government has proved each essential element of the offense beyond a reasonable doubt, then you must consider the defense of lack of criminal responsibility, or as it is sometimes called, the defense of insanity.

The law provides that a jury shall bring in a verdict of not guilty if the following test is met: The defendant must be found not guilty if, at the time of the criminal conduct, the defendant, as a result of mental disease, either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct.

A defendant who is intellectually aware that his act is wrongful is not responsible for that act if he does not appreciate the wrongfulness of that act because mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior can

Charge of the Court

have little significance.

Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for his acts. But that assumption no longer controls when evidence is introduced that he may have a mental disease or defect.

The defense of lack of criminal responsibility, or as it is sometimes called, the defense of "insanity" does not require a showing that the defendant was disoriented as to time or place.

Mental disease includes any abnormal condition of the mind, regardless of its mental label, which substantially affects mental or emotional processes and substantially impairs behavior controls. The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions.

In considering whether the defendant had a mental disease at the time of the unlawful act with which he is charged, you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls.

The burden is on the Government to prove

Charge of the Court

beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty.

In considering the defense of lack of criminal responsibility or insanity, you may consider the evidence that has been admitted as to the defendant's mental condition before and after the offense charged, as well as the evidence as to defendant's mental condition on that date. The evidence as to defendant's mental condition before and after that date was admitted solely for the purpose of assisting you to determine the defendant's condition on the date of the alleged offense.

(continued on next page)

Simon
TlamRla
follows

Charge of the Court

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2 THE COURT: (continuing) You have heard the
3 evidence of psychiatrists who testified as expert wit-
4 nesses. An expert in a particular field is permitted
5 to give his opinion in evidence. In this connection,
6 you are instructed that you are not bound by medical
7 labels, definitions, or conclusions as to what is or is
8 not a mental disease. Why psychiatrists and psychol-
9 ogists may or may not consider a mental disease for
10 clinical purposes where their concern is treatment, may
11 or may not be the same as mental disease for the purpose
12 of determining criminal responsibility. Whether the
13 defendant has a mental disease must be determined by
14 you under the explanation of those terms as it has
15 been given to you by the Court.

16 There is also testimony of lay witnesses with
17 respect to their observations of the defendant's
18 appearance, behavior, speech, and actions. Such
19 persons are permitted to testify as to their own
20 observations and other facts known to them, and may
21 express an opinion based upon those observations and
22 facts known to them.

23 In weighing the testimony of such lay witnesses,
24 you may consider the circumstances of each witness,
25 his opportunity to observe the defendant, and to know
the facts to which he has testified, his willingness

Charge of the Court

and capacity to expound freely as to his observations and knowledge, the basis for his opinions and conclusions, and the nearness or remoteness of his observations of the defendant in point of time to the commission of the offense charged.

You may also consider whether the witness observed extraordinary or bizarre acts performed by the defendant, or whether the witness observed the defendant's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witnesses' observation of the defendant, and the nature and length of time of the witnesses' contact with the defendant. You should bear in mind that an untrained person may not be readily able to detect mental disease, and that the failure of a lay witness to observe abnormal acts by the defendant may be significant only if the witness had prolonged and intimate contact with the defendant.

You are not bound by the opinions of either expert or lay witnesses. You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case, and

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Charge of the Court

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2 give it such weight as you believe it is fairly entitled
3 to receive.

4 You may also consider that every man is presumed
5 to be sane, that is, to be without mental disease,
6 and to be responsible for his acts. A presumption may,
7 however, be overcome by evidence. You should consider
8 these principles in the light of all the evidence in
9 the case, and give them such weight as you believe they
10 are fairly entitled to receive.

11 Where a defendant has raised the issue of his
12 insanity, and the jury finds from the evidence in the
13 case beyond a reasonable doubt that the accused was
14 not insane at the time of the alleged offense, it is
15 still the duty of the jury to consider all the evidence
16 in the case which may aid determination of state of
17 mind, including all evidence offered on the issue as
18 to insanity, in order to determine whether the defen-
19 dant acted or failed to act with the requisite malice
20 aforethought, as charged.

21 If the evidence in the case leaves the jury
22 with a reasonable doubt whether the mind of the
23 accused was capable of acting with the requisite
24 malice aforethought to commit the crime charged, the
25 jury should acquit the accused.

Charge of the Court

As stated before, the law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence.

There is evidence in this case tending to show that the defendant was intoxicated prior to and at the time of the alleged commission of the homicide.

If you find beyond a reasonable doubt that the defendant was sane at the time of the crime, then the fact that he may have been intoxicated does not relieve the defendant of any criminal responsibility.

You have also heard testimony that the defendant smoked hashish. You should weigh such evidence only as it bears on the crime charged in the indictment which I have read to you and only that crime. The defendant does not stand accused of a drug charge.

You may hear me sometimes refer to direct evidence and to circumstantial evidence, and it is well to explain now the difference between these two types of evidence.

Direct evidence is where a witness testified to what he saw, heard or observed, what he knows of his own knowledge, something which comes to him by virtue of his senses.

Circumstantial evidence is evidence of facts

Charge of the Court

and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind. Stated somewhat differently, circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence, if believed, is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of a defendant.

A defendant is presumed innocent of the crime. Thus, the defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt, and reasonable doubt is doubt based

Charge of the Court

upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

You, the jury, will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses, or producing any evidence. If the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you, the jury, must, of course, adopt a conclusion of innocence.

I have said that the defendant may be proven guilty either by direct or circumstantial evidence. I have said that direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eye-witness. Also, circumstantial evidence is proof of a chain of facts and circumstances, indicating the guilt or innocence of a defendant. You, the jury, may make

Charge of the Court

common sense inferences from the proven facts.

It is not necessary that all inferences drawn from the facts in evidence be consistent only with guilt, and inconsistent with every reasonable hypothesis of innocence. The test is one of reasonable doubt, and should be based upon all the evidence, the testimony of the witnesses, the documents offered into evidence, and the reasonable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from the facts which have been proved. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof.

Charge of the Court

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2 You as jurors are the sole judges of the
3 credibility of the witnesses and the weight their testi-
4 mony deserves, and it goes without saying that you
5 should scrutinize all the testimony given, the
6 circumstances under which each witness has testified,
7 and every matter in evidence which tends to show
8 whether a witness is worthy of belief. Consider each
9 witness' intelligence, motive and state of mind, and
10 his demeanor and manner while on the stand. Consider
11 the witness' ability to observe the matters as to which
12 he has testified, and whether he impresses you as having
13 an accurate recollection of these matters. Consider
14 also any relation each witness may bear to either side
15 of the case; the manner in which each witness might
16 be affected by the verdict; and the extent to which, if
17 at all, each witness is either supported or contradicted
18 by other evidence in the case.

19 Inconsistencies or discrepancies in the testimony
20 of a witness, or between the testimony of different
21 witnesses, may or may not cause the jury to discredit
22 such testimony. Two or more persons witnessing an
23 incident or a transaction may see or hear it differently,
24 and innocent misrecollection, like failure of recollec-
25 tion, is not an uncommon experience.

Charge of the Court

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance, or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

As to making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

When a defendant in a case of this kind takes the stand, which he has a perfect right to do, he is subjected to all the obligations of witnesses, and his testimony is to be treated like the testimony of any other witness; that is to say, it will be for you to say, remembering the substance of his testimony, the manner in which he gave it, his cross-examination, and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember, you have a perfect right to do so, the very grave interest the defendant has in the case. As he places himself as a witness, he stands like any other witness.

Evidence that at some other time a witness, other than the accused, has said or done something, or has failed to say or do something, which is inconsistent with the witness' testimony at the trial, may be considered by the jury for the sole purpose of judging

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Charge of the Court

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the credibility of the witness; but may never be considered as evidence or proof of the truth of any such statement.

Where a witness is a defendant on trial in the case, and, by such statements or other conduct, the defendant admits some fact against his interest, then the statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the fact so admitted, as well as for the purpose of judging the credibility of the defendant as a witness.

An act or omission is "knowingly" done if done voluntarily and intentionally, not because of mistake or accident, or other innocent reason.

Every witness' testimony must be weighed as to its truthfulness. If you find any witness lied as to any material fact in the case, then the law gives you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony was true and which was false, then the law allows you to take the portions which were true and weight it, and disregard those portions which were false. That again is within your prerogative.

Charge of the Court

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2 The weight of the evidence is not necessarily
3 determined by the number of witnesses testifying on
4 either side. You should consider all the facts and
5 circumstances in evidence to determine which of the
6 witnesses are worthy of greater credence. You may find
7 that the testimony of a smaller number of witnesses on
8 one side is more credible than the testimony of a
9 greater number of witnesses on the other side.

10 You are not obliged to accept testimony, even
11 though the testimony is uncontradicted and the witness
12 is not impeached. You may decide, because of the
13 witness' bearing and demeanor, or because of the
14 inherent improbability of his testimony, or for other
15 reasons sufficient to you that such testimony is not
16 worthy of belief.

17 The Government is not required to prove the
18 essential elements of the offense as defined in these
19 instructions by any particular number of witnesses.
20 The testimony of a single witness may be sufficient
21 to convince you beyond a reasonable doubt of the
22 existence of an essential element of the offense
23 charged, if you believe beyond a reasonable doubt that
24 the witness is telling the truth.

25 Testimony was introduced as to the defendant's

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2 mental condition at the time of the commission of the
3 crime. A layman may give an opinion on the issue of
4 insanity only on the basis of facts known to him. An
5 expert, however, may base his opinion on the facts which
6 he has observed, or on the facts which he has heard
7 others relate, or on hypothetical facts based on the
8 evidence.

9 Expert testimony on the issue of the defendant's
10 sanity is not binding on the jury, and you may reach a
11 contrary conclusion on the basis of other evidence in
12 the case. You should, however, consider it together
13 with all the other evidence in the case in determining
14 the defendant's mental condition at the time of the
15 commission of the crime charged in the indictment.

16 There is nothing peculiarly different in the
17 way a jury should consider the evidence in a criminal
18 case, from that which all reasonable persons treat any
19 question, depending upon evidence presented to them.
20 You are expected to use your good senses; consider the
21 evidence in the case for only those purposes for which
22 it has been admitted, and give it a reasonable and fair
23 construction, in the light of your common knowledge of
24 the natural tendencies and inclinations of human beings.

25 If an accused be proved guilty beyond reasonable

doubt, say so. If not proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

In making the factual determination on which your verdict will be based, you may consider only the exhibits which have been admitted in evidence, and the testimony of the witnesses as you have heard it in this courtroom.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

Now, in this type of case there must be a unanimous verdict. That means all twelve of you must agree, and it goes without saying that it becomes incumbent upon you to listen to one another, and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors'

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2 argument is one commensurate with yours, or whether at
3 least you can with good conscience agree with him. You
4 have no right to stubbornly or idly sit by and say,
5 "I'm not talking to anyone," "I am not going to
6 discuss it," because people with common sense and the
7 ability to reason must communicate. They must
8 communicate their thoughts. So, anything which appears
9 in the record, and about which one of you may not agree
10 -- talk it out amongst yourselves, and then if you
11 can't agree as to what is in the record, well, you can
12 ask the Court to have that portion of the testimony read
13 back to you. You may do so by knocking on the door and
14 giving a note in writing to the clerk, who will then
15 present it to the Court, and I will then bring you
16 into the courtroom.

17 If any reference by the Court or by counsel to
18 matters of evidence does not coincide with your own
19 recollection, it is your recollection which should
20 control during your deliberations.

21 You, Juror No. 1, are the Foreman. You will
22 preside over the deliberations, and you will be the
23 spokesman here in court.

24 You have the following forms of verdict which
25 you can bring in this case. It being a one count

indictment, the form of your verdict will be:

If you find the defendant not guilty, the form of your verdict is, "We, the jury, find the defendant not guilty."

If you find the defendant guilty, you may announce it as, "We, the jury, find the defendant guilty."

Those are the two forms of verdict.

(continued next page)

That is the Court's charge at this time. The marshals will now be sworn and they will take you to the deliberating room.

(The marshal was thereupon sworn by the deputy clerk of the courtroom.)

THE COURT: All right, Mr. Foreman, ladies and gentlemen of the jury, follow the marshal.

Oh, the alternates at this time. Bring them back. Just one second.

(The jury having partially left the courtroom thereupon returned to the courtroom.)

THE COURT: I have two thoughts at this time. The first thought is that the alternates must be discharged and no longer go into the jury room with the prime jury of twelve people who were chosen.

My second thought is since it is 12:00 o'clock I am going to have you go out to lunch and in this way you will have missed most of the rush in the restaurants, and then have you brought back and at that time deliberate. While you are lunch do not discuss the case in public. Wait until you get back to the jury room to discuss it, any part of it.

In addition I will permit the two alternates to go to lunch with you on condition that the case is

1 not discussed at lunch.

2 Immediately after lunch the two alternates will
3 be discharged and they need not come back to the jury
4 room or the courtroom. Your jury service will then be
5 recognized. Okay. Do not discuss the case at this
6 time.

7 (The jury thereupon retired from the courtroom
8 at 12:00 o'clock noon.)

9 MR. CHREIN: Your Honor, if jury asks to see
10 specific exhibits such as the Government's hashish or
11 the statement --

12 THE COURT: No, the hashish will not be
13 permitted to go into the jury room.

14 MR. CHREIN: No. But I was thinking more in
15 terms of the statement. Is there any reason why I
16 shouldn't leave these documents with the Clerk?

17 THE COURT: No. Leave them with us. We will
18 make a ruling at this time that any of the exhibits
19 with the exception of the hashish which has been
20 marked in evidence will be submitted to the jury if
21 they request them.

22 MR. CHREIN: Without the need of summoning
23 counsel.

24 THE COURT: Without the need of summoning
25 counsel.

1 MR. DAWSON: I have my folder here containing
2 all the Government exhibits (indicating).

3 THE COURT: We will look through the exhibits
4 and if they request them they will be sent in.

5 MR. CHREIN: I will leave these four exhibits
6 with the Clerk. Will you take them, Harold?

7 THE DEPUTY CLERK: Yes.

8 THE COURT: They won't be back until about
9 2:00 in any event.

10 MR. CHREIN: Should I be required, and if I am
11 not here, a call to my office will get me.

12 THE COURT: By the way, there were no exceptions
13 to the charge.

14 MR. CHREIN: No exceptions.

15 MR. DAWSON: No exceptions.

16 (At 12:45 o'clock p.m. a recess was thereupon
17 taken until 2:00 p.m.)
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AFTERNOON SESSION

(The jury thereupon returned to the courtroom at 3:15 p.m.)

(Jury note referred to was received and marked Court's Exhibit 1.)

THE COURT: All right, good afternoon. I received a note marked Court's Exhibit 1 now:

"Required testimony psychological report of Dr. Taub, Rutgers University while defendant was in detention (recently)," signed by the Foreman.

There is no testimony by Dr. Taub, or there are no papers in evidence by Dr. Taub or anyone connected with Rutgers University about the defendant.

Now, you will recall I said that papers that are marked for identification are not permitted to be seen by the jury.

THE FOREMAN: This was remembered in the arguments.

THE COURT: If there was reference to a Dr. Taub who examined him in Springfield, if that is what you are talking about, it is not in evidence. The reference is in evidence that there has been some discussion. But there was no report by him that was in evidence that you can look at.

THE FOREMAN: Could we hear the testimony

1 relating to the reference?

2 THE COURT: You can hear that. We will try to
3 find it now.

4 Are you going to stay there and wait for a
5 few minutes while we see if we can locate it?

6 MR. CHREIN: Your Honor, could the jury go back?

7 THE COURT: Well, we may need discussion about
8 it to agree as to which part of it you will hear. The
9 testimony relating to Dr. Taub?

10 THE FOREMAN: It was quoted by one of the
11 psychiatrists.

12 THE COURT: Yes, Dr. Kinzel.

13 (The jury thereupon retired from the court-
14 room.)

15 MR. CHREIN: Just one question, your Honor.
16 I think since the jury characterized Dr. Taub from
17 Rutgers --

18 THE COURT: They don't characterize him from
19 Rutgers. Dr. Taub, Rutgers U, whatever that was,
20 while the defendant was in detention. I don't know
21 what that means.

22 MR. CHREIN: Dr. Perr was from Rutgers.

23 THE COURT: They said Dr. Taub. We will stay
24 with him now.

25 MR. CHREIN: Perhaps we can have that matter

1 cleared up.

2 THE COURT: How can you clear that up? They
3 volunteered it to me. I didn't ask them. They want
4 Dr. Taub.

5 MR. DAWSON: Can we have a moment to look for
6 it?

7 THE COURT: I think it was the next to the last
8 day.

9 I have something on page 717:

10 "I'm going to show you defendant's Exhibit U
11 for Identification, which is a report on the
12 stationery of the College of Medicine and Dentistry,
13 Rutgers Medical School, signed by Irving M. Pia, and
14 I ask you if you have seen that in connection with your
15 studies in this case."

16 MR. DAWSON: That is not the same. I think it
17 came about on my cross-examination of Dr. Kinzel.

18 THE COURT: That was the next day. I think so,
19 too.

20 MR. DAWSON: I have gotten up to 792 without
21 reference to any doctor.

22 MR. CHREIN: I think it is on 796.

23 THE COURT: There was something about it. It
24 didn't mention his name yet.

25 MR. CHREIN: He is being shown the Report from

1 Springfield at that point.

2 THE COURT: Yes. Let's see now. 798: "Is
3 there anything else in this report, Doctor?"

4 He is talking about a psychologist. He gave the
5 definition of psychologist. I do not see his name
6 yet.

7 All right, 802:

8 "All you aware of what is that gentleman's
9 name, Dr. Taub." At the bottom of the page, twenty-
10 four:

11 "Are you aware of having read his report?"

12 "Yes."

13 And let's see now.

14 MR. DAWSON: (803 on top.

15 THE COURT: Yes. That he said in his opinion
16 the defendant was making every effort to appear
17 psychotic and he questioned defendant's motive for
18 trying to give him that appearance. Right.

19 MR. DAWSON: Then we have the answer.

20 THE COURT: That is what he said, yes.

21 Then that is answered.

22 Now then you go down to the witness' having a
23 number of problems with this report --

24 MR. DAWSON: I think that is all I asked him.

25 THE COURT: That is all.

1 Your Honor, can I just see if the matter was
2 gone into on redirect.

3 THE COURT: Yes. That was that. Redirect
4 starts on 839 or 840. All right, now the first ques-
5 tion -- the first page is Dr. Perr.

6 MR. CHREIN: On 845.

7 THE COURT: Yes, I see it.

8 MR. DAWSON: That was objected to and sustained.

9 MR. CHREIN: I understand that.

10 MR. DAWSON: It was objected to and sustained.

11 MR. CHREIN: Your Honor, I would request --

12 MR. DAWSON: Just a moment. Let me read
13 through.

14 THE COURT: Down at the bottom.

15 MR. DAWSON: Which page, Judge?

16 THE COURT: The same page:

17 "Doctor, does the report of Dr. Taub -- does
18 the conclusion of Dr. Taub recommend that the defendant
19 be brought back for trial or recommend treatment before
20 trial."

21 That was sustained likewise. I think you
22 dropped it at that.

23 MR. DAWSON: I think that is all there is.

24 THE COURT: We had better make sure.

25 MR. DAWSON: That is it.

1 MR. CHREIN: Can I ask this question, after
2 reading the material from Dr. Taub, which is that
3 one question and answer, would the Court -- since
4 they seem to be interested in the defendant's condition
5 at Springfield -- would the Court ask if that is all
6 they want from the Springfield report. And it doesn't
7 necessarily invite comment --

8 THE COURT: There is nothing else. What am I
9 going to ask them?

10 MR. DAWSON: We can only respond to specific
11 questions.

12 THE COURT: It is where the evidence is now.
13 I can't respond to anything else.

14 MR. DAWSON: I think the bottom of 802 and top
15 of 803 is the only reference to Dr. Taub.

16 THE COURT: Other questions were sustained.
17 I think it is fair to say that.

18 MR. DAWSON: Yes.

19 THE COURT: Questions on redirect were sustained.

20 MR. CHREIN: What line does the Court intend
21 to have read back? From what point?

22 THE COURT: There is only one place.

23 MR. DAWSON: Line 25 on page 802 up to line 5
24 on page 803.

25 THE COURT: That is all.

1 MR. CHREIN: In other words, I would submit
2 that perhaps we ought to identify who the psychologist
3 is.

4 THE COURT: All right, we will start with line
5 20. O.K. Now did you say senior psychologist? Are
6 you aware of what that gentleman's name is, Doctor?
7 That will follow in sequence.

8 MR. DAWSON: Yes.

9 THE COURT: Bring in the jury.

10 (The jury thereupon returned to the courtroom
11 at 3:26 p.m.)

12 THE COURT: We have found the one place and we
13 will have it read to you.

14 (The reporter thereupon read from line 20 at
15 page 802 to line 5, page 803.)

16 THE COURT: That is all there is reference to
17 Dr. Taub. There were other questions asked on redirect
18 but the objections to the questions were sustained.
19 And where it is sustained it is not in evidence so
20 that you need not consider it.

21 (The jury thereupon retired from the courtroom
22 at 3:28 p.m.)

23 (Continued on next page.)
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(The following occurred at 4:30 o'clock P.M.)

THE COURT: All right, bring in the jury.

THE CLERK: Jury note, marked as Court Exhibit number 2.

(Document referred to was received and marked Court's Exhibit number 2.)

THE CLERK: Mr. Foreman, Ladies and Gentlemen of the Jury, have you agreed upon a verdict?

THE FOREMAN: We have.

THE CLERK: How do you find the defendant, Guilty or Not Guilty?

THE FOREMAN: We find the defendant Guilty.

THE CLERK: Ladies and Gentlemen of the Jury, as the Court has received your verdict, you say you find the defendant Guilty, and so say you all.

MR. CHREIN: May we have the jury polled?

THE COURT: You may be seated, please (addressing Foreman).

Poll the jury.

THE CLERK: Juror No. 1, is that your verdict?

JUROR NO. 1: Yes.

THE CLERK: Juror No. 2, is that your verdict?

JUROR NO. 2: Yes, it is.

THE CLERK: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes.

1 THE CLERK: Juror No. 4, is that your verdict?

2 JUROR NO. 4: Yes.

3 THE CLERK: Juror No. 5, is that your verdict?

4 JUROR NO. 5: Yes.

5 THE CLERK: Juror No. 6, is that your verdict?

6 JUROR NO. 6: Yes.

7 THE CLERK: Juror No. 7, is that your verdict?

8 JUROR NO. 7: Yes.

9 THE CLERK: Juror No. 8, is that your verdict?

10 JUROR NO. 8: Yes.

11 THE CLERK: Juror No. 9, is that your verdict?

12 JUROR NO. 9: Yes.

13 THE CLERK: Juror No. 10, is that your verdict?

14 JUROR NO. 10: Yes.

15 THE CLERK: Juror No. 11, is that your verdict?

16 JUROR NO. 11: Yes.

17 THE CLERK: Juror No. 12, is that your verdict?

18 JUROR NO. 12: Yes.

19 THE CLERK: Jury polled.

20 THE COURT: All right, the jury has been polled.

21 It has been found to be unanimous that the defendant
22 is guilty of the count that he has been charged with.

23 That terminates your service. And I want to
24 thank you very much for being in my courtroom. I am
25 sure that you made your determination to the best of

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THE DEFENDANT: Your Honor, I have something
I would like to read.

THE COURT: You may read it.

THE DEFENDANT: Sir, James Gandrin, presented
with the unique -- of admitting one as most
honorable as himself -- within a moment's individual
power. I wish to read the following:

There is a certain kind of certainty, that one,
divinely inspired, can be a great man. I am not a great man.

1 of all governments where they have been permitted
2 to think and speak freely. Please, as you hold in
3 my faith -- a delicate rasp with thy -- your Honor's
4 hand, consider not to serve myself personally, an
5 economic gain or acquirement unfairly or similar --
6 one of moral expectation. I continue a verbal
7 assault and transgress. They are continually and
8 successfully ignored and avoided when possible. Had
9 I not taken any action to circumvent the sexual
10 attack, to my thinking then and now that I would
11 have quite possibly been sodomitically raped. My notion
12 was an offense agitated with a fear and confusion,
13 please do not as I am not -- the rage which I
14 unfortunately felt were the results of the counter-
15 action that became so violently tragic.

16 "Please note at the time of the offense, the
17 incapacity, although I fully understand there was
18 no legal excuse for the despicable behavior and
19 counteraction which has convicted me of taking of
20 a second human life. Please, although consider
21 the mitigation circumstances which I had been
22 presented with, the traumatic experience that I have
23 undergone and the -- moral injury as I have said --
24 with justice please consider I had admitted assaulted
25 -- I was assaulted with the same circumstances of

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which I have never bargained for.

I have yet not been able to erase that
trauma from my mind. I have made the conviction
that my long-suffering feelings would not prevail again
-- still they prevail again. I do not anxiously
ask your favor, please do not be -- I hold no
prejudice against homosexuals in its own right. I
have absolutely no quarrel with this behavior. I
wish to be a heterosexual individual, and my sex is
does not permit homosexual behavior to be transgressed
upon myself. The panic into which I fell -- because
of moral -- because of moral -- confirmed in the
belief that God created man for man and vice versa,
these precepts of this philosophy have been taught
and bred and is also instinctively in my nature and
has been spoiled by perverted attempt -- be -- be
-- the liberty of conscience for himself to resist
invasion of moral morals. As I appeal to the
Senate, these are the grievances which I have
this time before the Senate and the honor with
freedom of land which become of a free people
in observing their rights have been deprived from
the land of the people and is now an act to give
privileges to the people.

I am, Sir, your obedient servant.

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1 nature -- the jury system is the servant of the
2 people. Please open your heart, your Honor, to
3 liberalize and expand on the great opinions of the
4 right -- but a government consistent with the heart
5 of its people and its interests, that your Honor
6 might add the restoration of that tranquility for
7 which I humbly petition you. This, your Honor, this
8 is my only hope, that you be pleased to emphasize
9 the earnest endeavor and to perpetuate and endure
10 the right of my mind against the offense -- to help
11 establish something between mind and body, mind and
12 spirit, that it may continue -- I pray that thy Honor
13 will preserve liberty and freedom. It is with
14 heartfelt satisfaction that I have been allowed to
15 address thy Honor before thy judicial system --"

16 MR. CHRISTIN: I have nothing further to add,
17 your Honor.

18 THE COURT: You have nothing further to say,
19 Mr. Hendrix?

20 THE DEFENDANT: No, sir. Thank you.

21 THE COURT: Mr. Dawson?

22 MR. DAWSON: Nothing, your Honor.

23 THE COURT: The Court of A is ready to
24 sentence the defendant. The Court first of all
25 wishes to place upon the record that because of

1 the nature of the crime itself and the seriousness
2 and gravity of the crime will not give the defendant
3 youth correction treatment, although his age would
4 require the Court to consider such treatment.

5 As to the sentence to be imposed upon the
6 defendant, this is probably one of the most serious
7 types of crime that a person can commit, of taking
8 a life of an individual, whether it be during an
9 emotional and passionate situation. Whether it be
10 during a deliberate attack without emotion or passion.
11 Because of that, of course it must be of necessity,
12 incarceration for a period. So that a person who
13 has committed that type of crime may at least not come
14 out again and commit a similar type crime.

15 The Court has recognized during the entire
16 trial, the first trial and the second trial, that
17 the question of the attitude of the defendant and the
18 mental attitude of the defendant at the time of the
19 commission of the crime was one of the issues that
20 had to be determined by the jury. The first jury
21 was incapable of doing so. It wasn't a fact whether
22 he knew the nature of the crime, but the condition
23 of his mind at the time.

24 The second jury did find the defendant guilty
25 as charged.

1 That being so, this Court must then impose
2 what it believes would be a fair, just and
3 reasonable sentence under the circumstances.

4 Taking into consideration the defendant, his
5 background, the very, very limited life that he has
6 led, lack of family relationship, mother, father,
7 broken home, numerous things that led up to his
8 situation where it places him before the Court at
9 this time at the mercy of the Court, seriousness of
10 the crime that was committed at a port in Russia,
11 and it is still the allegation that this crime
12 was committed because of an attack to say the least
13 might have been improper and he claims he might
14 have been consummated if he hadn't fought, the
15 Court takes into consideration the continued attack
16 of the person and if he had subdued the person, if
17 that were the fact, and I assume the jury found
18 the same facts that being so, this Court takes into
19 consideration all the factors placed upon the
20 record and finds that every defendant that comes
21 before the Court has some good and that good either
22 by incarceration or otherwise can be brought forth.

23 He is definitely in need of some type of
24 treatment for his depressive state that he falls
25 into from time to time. Because of that the Court

1 likewise considers the sentence that it will
2 impose upon him. That being so, I find that this
3 Court has a tremendous latitude in the length of
4 sentence that could be imposed upon this defendant,
5 anywhere from 30 years down to one year. That
6 being so, this Court finds that a fair and reasonable
7 just sentence under the circumstances, considering
8 the taking of the life of an individual, regardless
9 of the circumstances that caused the taking of that
10 life, that this defendant is sentenced to nine years
11 in jail. And that he shall receive treatment for
12 his mental condition and treatment to rehabilitate
13 him.

14 That is the Court's sentence.

15 MR. DAWSON: Thank you, your Honor.

16 MR. CHREIN: Your Honor, inasmuch as there
17 was a verdict at the trial and inasmuch as the
18 defendant was represented as an indigent defendant
19 by the Federal Defenders unit of the Legal Aid
20 Society, the defendant would request the Court to
21 file a notice of appeal.

22 MR. DAWSON: I have prepared the necessary
23 forms and an affidavit of indigency.

24 THE COURT: The Court must advise you that
25 you have a right to an appeal from a jury verdict.

1 If you do not have sufficient funds a lawyer
2 shall be continued to be supplied by the Legal Aid
3 Society and you have a right to appeal in forma
4 pauperis and the minutes, which have already been
5 given to you, shall likewise be afforded for the
6 sentence.

7 THE DEFENDANT: Your Honor, I wish to thank
8 you very sincerely.

9 (Whereupon, these proceedings were concluded.)
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CERTIFICATE OF SERVICE

January 14, 1976

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Paula Givney